Response to Amendments Offered by Representative Smith

1. Adds the bolded language to § 2(a)(1) (the provision requiring exhaustion of alternative sources): "that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources **known to such party**"

    - This amendment could enable a party to compel testimony or documents from journalists without first exercising reasonable diligence to pursue other sources. A party could always assert that it does not "know" of an alternative source, and the party would have no obligation to make any effort to find alternative sources. This proposed change would make reporters the first stop, rather than the last resort, when prosecutors and civil litigants are seeking information.

    - It is puzzling that the DOJ is seeking to change the "exhausted all reasonable alternative sources" standard when it has been a condition the DOJ has used in its own Guidelines for more than 30 years. The Guidelines require that the Department must have "unsuccessfully attempted to obtain the information from alternative nonmedia sources" before proceeding with a subpoena.

2. Strikes "based on information obtained from a person other than the covered person" from § 2(a)(2)(A) (the provision covering criminal investigations or prosecutions).

    - The phrase "based on information obtained from a person other than the covered person" makes clear that the party subpoenaing information or documents cannot short-circuit the Act by compelling disclosures from the covered person in order to establish the predicate facts necessary to warrant compelled disclosure. In other words, the necessary findings have to be made by the court before there can be *any* compelled disclosure.

    - Indeed, the DOJ's own Guidelines require that the necessary predicates for a subpoena be made "based on information obtained from nonmedia sources," so, again, it is puzzling that the DOJ is seeking this change in the bill.

    - This deletion could be acceptable, but only if the legislative history (e.g., report language) were to make clear that the purpose of the deletion is not to permit such a shortcut.

    - The deletion may be intended to respond to a criticism of the bill, to the effect that the covered person's published news reports ought to be considered as part of the factual basis for establishing that a crime has occurred and that the testimony or document sought is critical to the investigation, prosecution or defense. If that is the purpose of the amendment, it would be acceptable.

3. Page 3, lines 10 and 16 – replace "critical" with "important" (in the standard for disclosure in criminal and civil cases, respectively)

- This change would water down the bill and make compelled disclosure far too common. Almost by definition, litigants subpoena only information that is "important." Compelled disclosure of information from covered persons should be a last resort, not the first option.

4. Eliminate the public-interest balancing test of § 2(a)(4). This change results from the following three amendments: (1) Page 3, line 17, strike "matter;" and insert "matter; and"; (2) Page 4, line 22, strike "; and" and insert a period; and (3) Strike page 4, line 23 through page 5, line 2.

    - The public-interest balancing test is a crucial safety valve. It serves the function of ensuring that the public interest in receiving information is taken into account by the court. For example, without the balancing test, a court would have no option but to compel disclosure of a confidential source even when the source leaked a trade secret to expose safety problems with a child's toy.

    - The DOJ claims that it shouldn't have to make a showing in court why information is needed from a reporter in national security / terrorism cases. First, the public interest balancing test ensures that the government has to do more than simply go to court and utter the words, "we need it for national security." Second, when terrorism or national security is at issue, courts applying the balancing test will defer to the government, as courts regularly do in a number of contexts.

5. In the exception for terrorism and national security, change the requirement that the information sought be "necessary to prevent" an act of terrorism or harm to national security and replace it with a requirement that the information "will help to prevent, or to identify the origin of"

    - This exception threatens to swallow the rule by authorizing compelled disclosure any time the government deems compelled disclosure helpful to its work. Virtually any piece of information will "help" in some conceivable way – even if the information is insignificant and will not make any real difference in combatting terrorism or protecting national security.

    - The phrase "identify the origin of" is unnecessary; the existing language of the bill will enable the government to compel disclosure of such information when necessary to prevent a future terrorist attack or harm to national security.

6. Replace the death and bodily harm exception with the following: "(B) disclosure of the identity of such a source will help to prevent or identify criminal misconduct specified by the Attorney General."

    - **This exception would gut the statute**. **The Attorney General could nullify the shield at his or her discretion.** It would require disclosure in virtually every case – even when the "criminal misconduct" at issue is a technical violation of a

misdemeanor statute, and even when the disclosure alerted the public to important information about government corruption or wrongdoing.

- This exception would eviscerate the carefully crafted requirements for disclosure in criminal investigations and prosecutions (§ 2(a)(2)(A)) and classified leak investigations and prosecutions (§2(a)(3)(D)).

- Curiously, this exception would actually *prevent* disclosure if the impending death or bodily harm was not the result of "criminal misconduct."

7. In the exception for trade secrets and personal medical and financial information, replace "is necessary" with "will help."

    - This exception would swallow the rule. Virtually any piece of information will "help" in some conceivable way – even if the information is insignificant and will not actually lead to identification of the person who leaked the trade secret or personal information.